

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 17, 2005 Session

PAUL BRADEN v. NANCY STRONG v. EDDIE BRADEN

**A Direct Appeal from the Chancery Court for Lincoln County
No. 11,582 The Honorable J. B. Cox, Chancellor**

No. M2004-02369-COA-R3-CV - Filed February 16, 2006

This case involves the dissolution of three partnerships. Appellee partner filed complaint against Appellant partner seeking a dissolution of two partnerships, an accounting of the partnerships to show liability of each partner, and appointment of a receiver to wind up the businesses. Appellant partner filed a counter-claim seeking the dissolution and of a third implied partnership, as well as an accounting and damages for breach of contract and breach of fiduciary duty against the Appellee partner and his brother. The brother was added as a party to the action. The trial court ordered: (1) that the two partnerships be dissolved, (2) that the assets be divided forty-nine percent (49%) to the Appellee partner and fifty-one percent (51%) to the Appellant partner, (3) that the Appellee partner be awarded capital account adjustments, and that capital account adjustments be denied in part, and awarded in part for the Appellant partner, (4) that the construction business was an implied partnership, and (5) that the construction partnership be dissolved and assets divided twenty-five percent (25%) to the Appellee partner, twenty-five percent (25%) to the Appellant partner, and fifty percent (50%) to the third-party brother. The order of the trial court is affirmed as to the finding that the construction business was an implied partnership, that this partnership be dissolved and assets divided twenty-five percent (25%) to the Appellee partner, twenty-five percent (25%) to the Appellant partner, and fifty percent (50%) to the third-party brother, and as to the dissolution of the remaining two partnerships effective January 12, 2004. The order is further affirmed as to the denial of a capital credit to the Appellee partner for forty-nine percent (49%) of the debt rolled into the partnership promissory note. The trial court's order is, in all other aspects, reversed and remanded for consideration of capital account adjustments for the Appellant partner and Appellee partner, for a complete accounting of the construction business, Braden Construction/Braden LLC, and for consideration of the Appellant partner's claims of breach of contract and breach of fiduciary duty for Appellee partner's exclusion of Appellant partner from the Landscaping Concepts partnership.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed
in Part, Affirmed in Part and Remanded**

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Donald Capparella of Nashville, Tennessee for appellant, Nancy Strong

R. Whitney Stevens, Jr. of Fayetteville, Tennessee for Appellee, Paul Braden

Ben P. Lynch of Winchester, Tennessee for Appellee, Eddie Braden

OPINION

Paul Braden (“Appellee”) and Nancy Strong (“Appellant”) met in 1980, began a personal relationship in 1983, and cohabitated off and on for many years. On April 27, 1983, Paul Braden and Ms. Strong entered into the Landscaping Concepts Partnership (“LCP”) and executed a written partnership agreement. Prior to the formation of LCP, Ms. Strong had owned and operated a sole proprietorship, Parkers Landscaping, from 1981 until the time she became partners with Paul Braden. The LCP was located in Fayetteville, Lincoln County, Tennessee and initially limited its scope to providing landscaping services to commercial, government and individual customers. The written LCP Agreement states, in pertinent part:

3. Term. The partnership shall commence upon the execution of this agreement and shall continue for ninety-nine (99) years, unless earlier terminated in the following manner:
 - (a) By death, insanity, bankruptcy, retirement, withdrawal, resignation, expulsion or disability of one of the Partners.
4. Capital. The capital of the Partnership shall consist of the following items:
 - (a) The gross value of the stock in trade, books, debts, and other assets of the business of landscaping, heretofore carried on by Nancy Strong at Fayetteville, Lincoln County, Tennessee, less the outstanding liabilities of that business. The net value shall be credited to Nancy Strong as her share of the capital.
 - (b) The sum of money brought into the business by Paul Braden, which shall be credited to him as his share of the capital.
 - (c) Any further sums which either Partner shall with the consent of the other from time to time contribute for capital purposes, which shall be credited to his/her capital account.
 - (d) Each partner agrees that the percentage of capital contribution shall always remain as follows:
 - (I) Nancy Strong 51%
 - (ii) Paul Braden 49%

Under the LCP agreement, Ms. Strong was named managing partner and given the responsibility of managing the operations and the right to pay herself, or any other partner, a reasonable salary. Over time, Landscaping Concepts came to encompass several other businesses, including a survey business known as Braden Surveying, an antique business named Earthworks, and a construction and

barn building business, Braden Construction. For tax purposes, these businesses were considered to be under the LCP umbrella. Significantly, the partners never kept current capital accounts with respect to the LCP, even as it evolved into other businesses, which is reflected in the partnership income tax returns.

On June 5, 1989, Paul Braden and Ms. Strong formed a second partnership called Chicken Creek Farms Partnership (“CCFP”) and executed a written partnership agreement. The CCFP was also located in Fayetteville, Lincoln County, Tennessee and was established as a cattle farm. The written CCFP Agreement, which is very similar to the LCP contract, states, in pertinent part:

3. Term. The partnership shall commence upon the execution of this agreement and shall continue perpetually unless earlier terminated in the following manner:
 - (a) By death, insanity, bankruptcy, retirement, withdrawal, resignation, expulsion or disability of one of the Partners.
 - (b) By mutual agreement of the partners.
4. Capital. The capital of the partnership shall consist of the following items:
 - (a) The gross value of the stock in trade, accounts receivable and payable, debts, livestock, real estate, equipment, inventory and other assets of the partnership business heretofore carried on by Nancy Strong at Fayetteville, Lincoln County, Tennessee, less the outstanding liabilities of that business. The net value shall be credited to Nancy Strong as her share of the capital.
 - (b) The sum of money brought into the business by Paul Braden, which shall be credited to him as his share of the capital.
 - (c) Any further sums which either Partner shall, with the consent of the other from time to time contribute for capital purposes, which shall be credited to his/her capital account.
 - (d) Each partner agrees that the percentage of capital contribution and ownership of the partnership business shall always remain as follows:
 - (I) Nancy Strong 51%
 - (ii) Paul Braden 49%

Again, under the CCFP agreement, Ms. Strong was named managing partner and given the responsibility of managing the operations and the right to pay herself or any other partner a reasonable salary. The CCFP, which began as a commercial cattle operation, evolved into a registered Red Angus operation with a disciplined embryo transplant program. In 1992, the parties built a house on the farm. Despite the separate partnership agreement, the CCFP was handled for tax purposes under the LCP name.

In 1991, Paul Braden and Ms. Strong began operation of a construction business. The construction business was operated under the umbrella of LCP. In 1993, Paul Braden’s brother, Eddie Braden, joined the construction part of the business, and the business began using the name

Braden Construction Company (“Braden Construction”). No written agreement was executed between the three parties as to Braden Construction. Eddie Braden supplied \$1500 of the capital for Braden Construction and LCP also made a \$1500 capital contribution. Ms. Strong stated that Braden Construction was operated as a partnership and that the three parties agreed to share the profits and expenses as follows: Paul Braden - 25%, Nancy Strong - 25%, and Eddie Braden - 50%. Braden Construction operated under the construction license of Eddie Braden. Braden Construction did not file a tax return for 1992, but rather ran the business tax liability through the LCP tax number. In 1993, Braden Construction did file a tax return. The 1993 tax return indicated, on three separate K-1 forms, that Ms. Strong owned twenty-five percent (25%), Paul Braden owned twenty-five percent (25%), and Eddie Braden owned fifty percent (50%). The Braden Construction tax returns through 1998 also indicate the same divisions of ownership among the three parties. Unlike LCP, the parties kept ongoing current capital accounts for Braden Construction, which is reflected on the Braden Construction tax returns for the years 1997 through 2002.

In 1996, difficulties arose among the parties in the financial operation of Braden Construction. Ms. Strong alleges that Paul and Eddie Braden began to be secretive about the construction business jobs and ultimately moved the Braden Construction bank account to an account solely in the name of Eddie Braden. Ms. Strong was neither consulted nor notified prior to the moving of the bank account for Braden Construction. In January 1997, Paul and Eddie Braden filed articles of conversion with the Secretary of State of Tennessee to convert the Braden Construction partnership to a limited liability company (“LLC”). Paul and Eddie Braden assert that the purpose of converting to an LLC was to lessen liability and receive greater tax benefits. The articles of conversion stated that the terms and conditions of the conversion had been accepted by a unanimous vote of the partners, although, Ms. Strong was not consulted. In 1999, the Braden Construction tax return no longer listed Ms. Strong as a partner. Ms. Strong was made aware of her removal as a partner when she received the income tax forms from Lori Barnes (“Barnes”), Braden Construction’s accountant. Ms. Barnes told Paul Braden to put Ms. Strong back as a partner on the account of Braden Construction, which Paul Braden did prior to the next year’s tax filing.

In February 2001, approximately one month before Paul Braden filed his complaint in the present case, Paul Braden closed the bank accounts for LCP, Braden Surveying, and CCFP. Paul Braden did not notify Ms. Strong that he was going to close the accounts. Paul Braden then opened up a new account for the businesses, in which Ms. Strong was not included as a signee. Paul Braden asserts that he was justified in closing the bank accounts of the three businesses because Ms. Strong had drained all of the bank accounts, had defaulted on payments due to Farmers Home Administration and the Bank of Frankewing, and had created substantial debt to the detriment of the partnerships. Paul Braden also claims that Ms. Strong was taking a salary of \$750 a week from the surveying company without his knowledge or consent. Paul Braden argues that mismanagement of the partnership accounts by Ms. Strong, as well as her alleged misappropriation of funds, constituted bad faith and provided Paul Braden with a valid reason for closing the accounts.

Ms. Strong alleges that at the same time Paul Braden closed the accounts of the partnerships, he also stopped Ms. Strong’s weekly salary of \$750, and locked Ms. Strong out of the partnership offices. Ms. Strong claims that, as a result of these actions, she was forced to obtain a personal loan

in order to avoid foreclosure on the farmhouse, which was a partnership asset. Ms. Strong then began to deposit the proceeds from the operation of the farm into an account at AmSouth Bank, the only account on which Ms. Strong still could write checks. Ms. Strong ran the farm and paid for personal items from the AmSouth account.

In July 2001, after filing this lawsuit, Paul Braden formed a separate construction company. In the 2001 balance sheet that Paul Braden used to support his application for a contractor's license, he listed his cash assets as \$167,661. In his 2000 tax return, Paul Braden showed a distribution from Braden Construction in the amount of \$167,807. Ms. Strong argues that this indicates that Paul Braden used assets from Braden Construction to show his personal solvency for the creation of Paul Braden Construction. Paul Braden claims that, despite the amounts being nearly identical, they were not the same money. Ms. Strong further asserts that Paul Braden diverted funds and partnership opportunities from Braden Construction to himself and Paul Braden Construction.

This lawsuit began when Paul Braden filed his Complaint against Nancy Strong on March 23, 2001, seeking dissolution of LCP and CCFP. Additionally, in his Complaint, Paul Braden seeks an accounting "of all the partnership dealings so as to show the liability of each partner to the firm." On April 6, 2001, Ms. Strong answered Paul Braden's Complaint and filed a Counter-Complaint asking that LCP, CCFP and Braden Construction be declared dissolved. In her Counter-Complaint Ms. Strong also asks "that an account be taken of all the partnership dealing of the parties to show the liability of each partner to the firm and to each other." Further, Ms. Strong seeks damages for the breach of contract and the breach of fiduciary duties of Paul Braden as it relates to LCP, and for the breach of contract and the breach of fiduciary duties of both Paul and Eddie Braden as it relates to Braden Construction. Ms. Strong asserts that she was damaged with respect to the Braden Construction partnership by the unauthorized conversion of the partnership to an LLC, and by the removal of her twenty-five percent (25%) partnership interest without her consent. Furthermore, Ms. Strong asserts that the assets of Braden Construction were wrongfully diverted by Paul and Eddie Braden to their benefit and to the detriment of her partnership interest in Braden Construction. On April 6, 2001, Ms. Strong also moved the trial court to add Eddie Braden as a defendant to Ms. Strong's counter-claim. On August 27, 2001, by order of the trial court, Eddie Braden was made a party-defendant to Ms. Strong's counter-claim.

After a lengthy discovery process, a trial on the merits was held on January 12, 2004. The trial exhibits included many financial records of the partnerships presented by both Paul Braden and Ms. Strong; however, no independent accounting of the various businesses was performed. The trial court rendered a decision that was announced verbally from the bench at the conclusion of the trial. The decision was reduced to writing in a separate order entered February 11, 2004. However, the trial court did execute a written order on January 13, 2004 that was amended on January 16, 2004 and ordered that "the partnerships of Nancy Strong and Paul Braden, i.e. CCFP and LCP, and the partnership of Braden Construction Co./Braden Construction LLC, are hereby declared to be dissolved." The January 16, 2004, Amended Order further ordered that no assets of the partnerships shall be disposed of in any manner, except as may be necessary to feed livestock or pay employees of the survey business.

On February 11, 2004, the trial court issued its Order, which included fifteen pages of the Chancellor's verbal ruling given on January 12, 2004. A summary of the trial court's pertinent rulings from the February 11, 2004 Order, are as follows:

Braden Construction

- (1) As to Braden Construction, the trial court found that while there was no written partnership agreement, the facts indicated that there was an implied partnership agreement. As to the distribution of Braden Construction, they should be handled pursuant to the tax records reflecting a fifty percent (50%) ownership by Eddie Braden, twenty-five percent (25%) ownership by Paul Braden, and twenty-five percent (25%) ownership by Nancy Strong.
- (2) The trial court ordered the sale of the remaining construction equipment and that the proceeds be placed in a court dictated checking account that would be distributed after expenses of the construction company were deducted.
- (4) Following the sale of the assets of Braden Construction LLC, the preparation of the tax return, payment to the CPA, and distribution of fifty-percent (50%) of the funds to Eddie Braden, Eddie Braden should be dismissed from this action.

Landscaping Concepts

- (1) The trial court held that under 4(c) of the partnership agreement, the agreement did not restrict the partners in LCP from making capital contributions and getting credit for those contributions, despite the language in 4(d) of the partnership agreement stating that each partner agrees that the percentage of capital contribution shall always remain fifty-one percent (51%) Nancy Strong and forty-nine percent (49%) Paul Braden.
- (2) The trial court held that Paul Braden's claimed capital contributions and payment of expenses as represented on Exhibit 21, which was compiled by Ms. Barnes, the tax accountant and presented to the court by Paul Braden, were to be credited to him as capital contributions. However, Paul Braden would receive no capital account adjustment for the Earthworks debt rolled into the CCFP promissory note. Specifically, the court ordered that the amount of \$183,629.35 should be paid by Nancy Strong to Paul Braden as a capital account adjustment.
- (3) The capital account adjustment could be further adjusted for forty-nine percent (49%) of all business expenses shown by Nancy Strong to have been valid business expenses.

- (4) Nancy Strong was given until February 13, 2004 to show by proper partnership accounting that any of the funds represented by draws and check and shown on Exhibit 21, were business expenses and not used for her personal benefit.
- (5) After the capital account adjustments made, that the net of the Landscaping Concepts proceeds would be distributed fifty-one percent (51%) to Nancy Strong and forty-nine percent (49%) to Paul Braden, after sale expenses, debts of CCFP, LCP and Braden Construction were paid..

Chicken Creek Farms

- (1) All assets of the CCFP be sold.
- (2) Nancy Strong was to provide a detailed accounting by February 13, 2004, regarding the animal transactions relating to CCFP and to show that the proceeds of such sales were deposited into one of the farm accounts or face an adverse credibility holding.
- (3) Nancy Strong was given until February 13, 2004, to show that any funds represented by draws or checks and shown on the accounting of Ms. Barnes in Trial Exhibit 21, were business expenses of CCFP and not used for her personal benefit.

Braden Surveying

- (1) All equipment of Braden Survey be sold, and the proceeds first be applied to the sales expenses, then to satisfy all debt of Braden Surveying.
- (2) Any excess funds after the sale be deposited into the LCP account.

On February 17, 2004 Ms. Strong submitted an accounting to the trial court in response to the court's request that she show, by proper partnership accounting, that the funds represented by the draws and checks shown on Exhibit 21, were business expenses and were not used for her personal benefit. The amount of capital credits Ms. Strong claimed totaled \$88,354.88. Ms. Strong's accounting included over two-hundred pages of statements and receipts, many of which were outside the scope of the trial court's request.

The sale of LCP and CCFP partnership assets (including livestock, equipment and real estate) took place in April and May, 2004. The proceeds exceeded \$600,000 and, after the payment of partnership obligations, a balance of \$580,158.21 remained as of September 30, 2004. This Court stayed the distribution of the LCP and CCFP proceeds by Order dated December 9, 2004. Partnership assets of Braden Construction were also sold, and those proceeds were distributed by the trial court.

On June 7, 2004, Ms. Strong moved the trial court for an accounting of Braden Construction /Braden LLC. In support of her request for an accounting of Braden Construction/Braden LLC, Ms.

Strong relied upon the trial court ruling that she had a twenty-five percent (25%) interest in the construction company. Nonetheless, the court did not direct an accounting of Braden Construction. On July 12, 2004, Ms. Strong filed a motion asking the trial court to reconsider the capital account allocations awarded to Paul Braden in the amount of \$183,629.35 for LCP and CCFP. The trial court conducted a hearing on these motions, and issued an order denying them. The July 27, 2004 Order reads, in pertinent part, as follows:

This matter having come on for hearing the 13th day of July, 2004 upon the “Motion For Braden Construction Accounting” and the “Motion to Reconsider Capital Account Allocations For Landscaping Concepts / Chicken Creek Farms Partnerships”, each being presented on behalf of Nancy Strong; and it appearing that the Motion for Braden Construction Accounting should be denied because the information sought was reasonably discoverable prior to trial and issues relating to Braden Construction Company / LLC were litigated at trial; and it further appearing that the Motion to reconsider the capital account allocations for Landscaping Concepts / Chicken Creek Farms partnership[s] should be denied for the reasons stated in the original ruling of the Court at the conclusion the of trial.

On August 5, 2004, a hearing was held on the issue of capital credits to be awarded to Ms. Strong. The court issued its Order on August 25, 2004, holding that Ms. Strong was entitled to a credit of \$30,052.41. This ruling resulted in Ms. Strong owing \$153,576.94 to Mr. Braden out of her share of the partnership funds of LCP. The trial court deemed the August 25, 2004, Order as a final order for the purpose of appeal. On September 23, 2004, Ms. Strong filed a motion to stay execution of the judgment and the distribution of the approximately \$580,158 of funds in the LCP account. On November 10, 2004, the trial court refused to stay such distribution, unless Ms. Strong posted a bond in the amount of \$285,324.92. Ms. Strong appealed the trial court’s decision on the bond, and this Court reversed the trial court and ordered that the disbursement of the funds on deposit in the LCP account be stayed upon posting of a bond in the amount of \$50,588. On December 30, 2004, Ms. Strong filed a bond in the amount of \$50,588. On September 23, 2004, both Ms. Strong and Paul Braden filed timely Notices of Appeal and presented the following issues for review, as stated in their respective briefs:

As presented by Nancy Strong /Appellant:

- 1. Whether it was error for the trial court to fail to award Nancy Strong an accounting, having found that Braden Construction was a partnership and that she owned a 25% interest?**
- 2. Whether the trial court erred in awarding capital account adjustments to Paul Braden in the Landscaping Concepts and Chicken Creek Farms partnerships where (1) the**

applicable partnership agreements stated that the percentage of capital contribution would always remain 51% - 49% in favor of Nancy Strong, and (2) the course of dealing between the parties was to the same effect?

- 3. If this Court affirms the award of capital credits to Paul Braden with respect to Landscaping Concepts, whether it should reverse the trial court's refusal to consider capital credits claimed by Nancy Strong?**
- 4. Whether the trial court erred in failing to find a breach of contract and breach of fiduciary duty for Paul Braden's exclusion of Nancy Strong from the Landscaping Concepts partnership?**

As presented by Paul Braden/Appellee:

- 5. Whether the trial court erred in failing to award Paul Braden a capital credit equal to 49% of the personal debt of Nancy Strong that was rolled into the promissory note of Chicken Creek Farms?**

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the finding of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. *See* Tenn. R. App. P. 13(d).

- 1. Whether it was error for the trial court to fail to award Nancy Strong an accounting, having found that Braden Construction was a partnership and that she owned a 25% interest?**

In the Counter Complaint filed by Nancy Strong on April 6, 2001, she requested that “an account be taken of all the partnership dealings of the parties to show the liability of each partner to the firm and to each other.” However, an accounting of Braden Construction was never instituted by the trial court during the proceedings. Rather, the trial court relied upon the analysis of Braden Construction’s finances as submitted by Lori Barnes, tax accountant for the parties, on behalf of Paul Braden at trial. On June 7, 2004, Ms. Strong moved the trial court for an accounting of Braden Construction. The trial court denied Ms. Strong’s request for an accounting of Braden Construction by Order of July 27, 2004, stating that it appeared that the motion “should be denied because the information sought was reasonably discoverable prior to trial and issues relating to Braden Construction Company / LLC were litigated at trial.” In support of her request for an accounting of Braden Construction, Ms. Strong argues that, because Braden Construction had no written partnership agreement, the issue of whether a partnership existed was a matter for the court to decide. Paul and Eddie Braden contend that there was no partnership. In its February 11, 2004, Order, the

trial court held, as related to Braden Construction, that there was an implied partnership agreement, with Eddie Braden owning fifty percent (50%), Paul Braden owning twenty-five percent (25%), and Nancy Strong owning twenty-five percent (25%). Ms. Strong contends that, until the trial court's finding that she was a partner in Braden Construction, she had no grounds for requesting an accounting of Braden Construction. In support of her argument, Ms. Strong cites 59A AM. JUR. 2D *Partnership*, § 675 (2004) which states that "[a]n action for partnership accounting cannot be maintained unless the court finds that the partnership in question actually existed and that the person to be charged was a partner."

Further, Ms. Strong asserts that the trial court's reliance on the tax returns and capital account balances presented by Ms. Barnes, the partnership's tax accountant, was not a full representation of the finances of the construction company. Ms. Strong asserts that equipment sales, a Braden Construction money market account, and transfers from Braden Construction to a personal account of Paul Braden were not accounted for in the reports filed by Ms. Barnes. Additionally, Ms. Strong asserts that receipts from jobs begun prior to the formation of Paul Braden Construction Company should be credited to Braden Construction rather than to Paul Braden Construction.

Paul Braden argues that Ms. Strong is not entitled to an accounting of Braden Construction because the trial court did not find that Braden Construction was a general partnership with Nancy Strong as a partner, but rather that the trial court found that a partnership existed between Eddie Braden and LCP. Paul Braden cites the trial court's recognition of the fact that the original contributions to Braden Construction consisted of \$1,500 from Eddie Braden and \$1,500 from LCP. Furthermore, Paul Braden argues that Ms. Strong's request for an accounting can be made only in her capacity as a partner of LCP and for the benefit of LCP.

We find that Ms. Strong is entitled to an accounting of Braden Construction/ Braden Construction LLC as a matter of law. The trial court did not find that Ms. Strong was not entitled to an accounting of Braden Construction, rather the court denied Ms. Strong's motion because such an accounting was reasonably discoverable prior to trial. We agree with Ms. Strong's assertion that she had no legal right to request an accounting of Braden Construction until the court made the determination in its February 11, 2004 Order that Ms. Strong was, in fact, a partner in Braden Construction. The trial court held that Braden Construction was an implied partnership, as evidenced by the actions and dealings of the parties and the Braden Construction tax returns. Furthermore, the trial court found that distributions from Braden Construction would be based on the division of ownership; Eddie Braden owning fifty percent (50%), Paul Braden owning twenty-five percent (25%), and Nancy Strong owning twenty-five percent (25%).

The Uniform Partnership Act ("UPA"), was in effect until January 1, 2002, when it was replaced by the Revised Partnership Act. The UPA is applicable in the present case because the original claim and counter-claim were filed in 2001. The UPA governs the relations between the partners in a partnership to the extent that the partnership agreement does not otherwise provide for same. *Hoppen v. Powell*, 600 S.W.2d 736, 738 (Tenn. Ct. App. 1980). Under UPA a partner has an express right to an accounting of a partnership under specified conditions. T.C.A. § 61-1-121 (2000), provides:

61-1-121. Right of partner to accounting.

Any partner shall have the right to a formal account as to partnership affairs:

- (1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners;
- (2) If the right exists under the terms of any agreement;
- (3) As provided by § 61-1-120; and
- (4) Whenever other circumstances render it just and reasonable.

T.C.A. § 61-1-120(a) states that “every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.” We find that LCP is entitled to an accounting of Braden Construction/ Braden Construction LLC under T.C.A. § 61-1-121 (1), (3) and (4), as a fifty-percent (50%) partner in Braden Construction/Braden Construction LLC. Therefore, Nancy Strong, is entitled to an accounting of Braden Construction deemed on behalf of LCP. Because of her role as a partner and fifty-percent (50%) owner of LCP, Ms. Strong would be the beneficiary of the accounting and is entitled to her share of what the accounting reveals is owed LCP.

Furthermore, the financial figures provided to the trial court by Lori Barnes, the tax accountant for the partnerships in question, do not qualify as an accounting as that term is used in T.C.A. § 61-1-121 (2000). This Court has previously held that an accounting requires more than a computation of figures. *See Shepherd v. Griffin*, 776 S.W.2d 119, 122 (Tenn. Ct. App.1989). An accounting is a detailed statement of the mutual demand in the nature of debit and credit between the parties. WILLIAM H. INMAN, GIBSON'S SUITS IN CHANCERY § 405 (7th ed.1988). It is evident from the record that Ms. Barnes performed her duties in compiling the financial statement of Braden Construction at the request of Paul Braden. This does not, however, qualify as an independent accounting to which the partners are entitled under the statute. *Shepherd v. Griffin*, 776 S.W.2d at 122; *Hoppen v. Powell*, 600 S.W.2d 736, 738-9 (Tenn. App.1980). Consequently, we hold that the trial court erred in denying Ms. Strong an accounting of Braden Construction/ Braden Construction LLC. We reverse the ruling of the lower court on this issue and remand for the purpose of conducting an accounting of Braden Construction/ Braden Construction LLC. The Chancellor shall then determine, from the accounting, the accurate liability of each partner to the firm and a readjustment of the partnership's distribution, if necessary.

- 2. Whether the trial court erred in awarding capital account adjustments to Paul Braden in the Landscaping Concepts and Chicken Creek Farms partnerships where (1) the applicable partnership agreements stated that the percentage of capital contribution would always remain 51% - 49% in favor of Nancy Strong, and (2) the course of dealing between the parties was to the same effect?**

On July 12, 2004, Ms. Strong filed a motion asking the trial court to reconsider the capital account allocations awarded to Paul Braden in the amount of \$183,629.35 for LCP and CCFP. The trial court denied Ms. Strong's motion by Order of July 27, 2004, stating that the motion "should be denied for the reasons stated in the original ruling of the Court at the conclusion of trial." In the trial court's February 11, 2004 Order, the trial court interpreted the partnership agreement to say that the percentage of capital contribution shall remain fifty-one percent (51%) for Nancy Strong and forty-nine percent (49%) for Paul Braden; however, the trial court went on to say that the division of partnership assets should be offset by any additional capital contributions made by the parties. The pertinent sections of the LCP agreement are as follows:

- 4 (c) Any further sums which either Partner shall with the consent of the other from time to time contribute for capital purposes, which shall be credited to his/her capital account.
- (d) Each partner agrees that the percentage of capital contribution [and ownership of the partnership business¹] shall always remain as follows:
 - (I) Nancy Strong 51%
 - (ii) Paul Braden 49%

Ms. Strong argues that, because the partners did not maintain partner capital contribution figures at any time during the operation of the partnerships, all that is required to settle the partnership interests is to liquidate the assets and divide them according to the partnership agreement, fifty-one percent (51%) to Nancy Strong and forty-nine percent (49%) to Paul Braden. Ms. Strong asserts that the language of the partnership agreement (specifically that of paragraph 4(d)) supports a finding that actual partner capital contributions should not be used to adjust the capital accounts or to change the percentage of ownership of the partnerships. Paul Braden argues that the partnership agreement (specifically paragraph 4(c)) allows for adjustments based on capital contributions. Paul Braden asserts that the language in paragraph 4(c) clearly states that any sums that either partner contribute for capital purposes, shall be credited to his/her capital account.

The interpretation of a written agreement is a matter of law and not of fact. Therefore, our review is *de novo* upon the record with no presumption of correctness of the trial court's conclusions of law. *Union Planters Nat'l Bank v. American Home Assurance Co.*, 865 S.W.2d 907, 912 (Tenn. Ct. App.1993). The cardinal rule in the construction of contracts is to ascertain the intent of the parties. *West v. Laminite Plastics Mfg. Co.*, 674 S.W.2d 310, 313 (Tenn. Ct. App. 1984). The court, in arriving at the intention of the parties to a contract, does not attempt to ascertain the parties' state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written. *Id.* In construing contracts, the words expressing the parties' intentions should be given the usual, natural, and ordinary meaning. *Ballard v. North*

¹ The words in bracket appear only in the Chicken Creek Farms partnership agreement. Otherwise, the language in the agreements in paragraph 4(c) and (d) are identical.

American Life & Casualty Co., 667 S.W.2d 79, 82 (Tenn. Ct. App. 1983). If the language of a written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. *Sutton v. First Nat. Bank of Crossville*, 620 S.W.2d 526, 530 (Tenn. Ct. App. 1981). Courts cannot make contracts for parties but can only enforce the contract which the parties themselves have made. *McKee v. Continental Ins. Co.*, 234 S.W.2d 830, 831 (Tenn. 1950). A contract is not ambiguous merely because the parties have different interpretations of the contract's various provisions, *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc.*, 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994) (citing *Oman Constr. Co. v. Tennessee Valley Auth.*, 486 F.Supp. 375, 382 (M.D. Tenn. 1979)). Guided by the above-stated rules and the plain language of the LCP and CCFP partnership contracts, we agree with the trial court that both agreements provide for the adjustment of capital accounts, however, if, and only if, the other partner consents to such capital contributions.

Paragraph 4(d) states that the partners agree that the percentage of capital contribution shall remain fifty-one percent (51%) to Nancy Strong and forty-nine percent (49%) to Paul Braden. By contrast, Paragraph 4(c) allows for the adjustment in capital accounts when “either Partner shall ***with the consent of the other*** from time to time contribute for capital purposes, which shall be credited to his/her capital account.” (Emphasis added). It is our interpretation of this inartfully drawn agreement that the parties contemplated a 51% / 49% capital account division with a conditional provision allowing for change in the ratio. The contract provides that the ratio could be adjusted to account for capital account contributions, if the non-contributing partner consents to the contribution. In this way, the consenting partner could maintain the original ratio by making a like contribution. It would appear that by consenting and not making a like contribution, the other partner is implicitly allowing for a change in the ratio. The determination of whether either partner consented to the capital contributions of the other partner is a factual question, one not addressed by the trial court. Accordingly, we remand this issue to the trial court for a factual determination of whether consent was given by Ms. Strong for each contribution to the capital account by Paul Braden. If the trial court finds that Ms. Strong has consented to such contributions, then the capital account of Paul Braden should be adjusted accordingly.

3. If this Court affirms the award of capital credits to Paul Braden with respect to Landscaping Concepts, whether it should reverse the trial court’s refusal to consider capital credits claimed by Nancy Strong?

At the conclusion of the trial on January 12, 2004, the trial court found that Paul Braden’s claimed capital contributions and payment of expenses (as set out in Exhibit 21) were to be credited to him as capital contributions. Specifically, the court ordered Ms. Strong to pay \$183,629.35 to Paul Braden as a capital account adjustment. However, the trial court held that the capital accounts of the partners could be further adjusted in two categories if Ms. Strong provided sufficient proof by rebuttal evidence. First, Ms. Strong was given until February 13, 2004 to show, by proper partnership accounting, that any of the funds represented by the draws and checks on Exhibit 21, were business expenses of CCFP, and were not used for her personal benefit. Second, the trial court stated that Ms. Strong was to provide a detailed accounting by February 13, 2004, regarding the

cattle transactions relating to CCFP in order to show that the proceeds of such sales were deposited into one of the farm accounts. Sections 3(d)(1) & (2) of the trial court's February 11, 2004 Order relating to capital credits for Ms. Strong read as follows:

(1) Nancy Strong is given until February 13, 2004 to show by a proper partnership accounting that any of the sales proceeds shown on Exhibit 4 (appended hereto as "Chicken Creek Cattle Sales) were deposited into one of the farm accounts of Chicken Creek Farms at AmSouth or Bank of Frankewing. The amount of those proven deposits will be deducted from the total of \$50,600.10 on said Exhibit and 49% of the balance is payable by Nancy Strong to Paul Braden as a capital account adjustment.

(2) Nancy Strong is given until February 13, 2004 as managing partner to show to the Court by proper partnership accounting that any of the funds represented by draws and checks and shown on Schedules 2 through 12 inclusive of the accounting by Lori Barnes, Trial Exhibit 21, which is Appended hereto with said schedules, were business expenses of Chicken Creek Farms and not used or expended for her personal benefit. Exhibit 21, the accounting of Lori Barnes, CPA, is otherwise adopted by this Court as proper and representing an amount that is necessary to be paid by Nancy Strong to Paul Braden to adjust the capital accounts, in addition to (1) above. The amount of \$183,629.35, less 49% of the amount shown to the Court to have been a valid business expense as aforesaid, shall be paid by Nancy Strong to Paul Braden as a capital account adjustment.

On February 17, 2004, Ms. Strong requested information relating to cattle sales and personal/business expenses in the CCFP business. However, in addition Ms. Strong also submitted direct evidence on capital adjustment issues regarding alleged capital credits including various other business expenses, loan payments, IRS deposits, insurance proceeds, Braden Construction salary, and joint living expenses.

A hearing was scheduled for August 5, 2004 to address the issue of an adjustment in capital credits in favor of Ms. Strong. Prior to the August 5, 2004 hearing, counsel requested a determination by the court of what evidence would be allowed at the hearing. On August 2, 2004, the trial court heard arguments from both parties. On August 5, 2004, the Chancellor issued its Order pertaining to evidence relating to the hearing on Ms. Strong's capital credits. The Order reads, in pertinent part, as follows:

This matter having come before the Court the 2nd day of August, 2004 upon request of counsel for a determination by the Court of what evidence may be presented at the hearing scheduled for Thursday, August 5, 2004 at 9:00 a.m. on the issue of credits to be given to Nancy Strong pursuant to the Order entered on February 11,

2004 and particularly section (3).d(1) & (2) thereof; and the Court having considered the language of the order on pages 14, 15, 19 and 20, as well as arguments of counsel, and it appearing that the language of the order on pages 19 and 20 is controlling; and states the decision of the Court;

IT IS ORDERED that evidence from Nancy Strong on the issue of any credits that may be due to Nancy Strong against the amounts reflected in Section (3).d(1) & (2) of the order is restricted to that which is specifically allowed by that section and which was submitted to the Court on or before February 13, 2004. Such evidence shall address livestock sales proceeds (shown on Trial Exhibit 4) that were deposited into one of the farm accounts and such evidence as will show “that any of the funds represented by draws and checks and shown on schedules 2 through 12 inclusive of the accounting by Lori Barnes, Trial Exhibit 21, (which was exhibited to the prior order) were business expenses of Chicken Creek Farms and not used or expended for her personal benefit.”

On August 5, 2004 the trial court heard arguments from Ms. Strong and Paul Braden regarding the issue of capital credits to be awarded to Ms. Strong. The court issued its order on August 25, 2004, which reads, in pertinent part:

This matter having come before the Court the 5th day of August, 2004 for a determination of the amount of any credits to which Nancy Strong is entitled against the amount being 49% of \$50,600.10 due to Paul Braden as set out in section (3).d.(1) of the Order of this Court entered February 11, 2004 relating to cattle proceeds and it appearing from the evidence presented at trial and certain stipulations, Mrs. Strong has accounted for all of the pre-dissolution cattle sales proceeds, except those to Collins Williams in the sum of \$2,882.76, Swander/Higdon in the sum of \$3,087.36 and Leon Baker in the sum of \$2,191.93 for a total of \$8,162.05. Ms. Strong owes Mr. Braden 49% of that amount or \$3,999.40 out of her share of the Landscaping Concepts partnership funds.

This matter having also come before the Court for a determination of what credits that Nancy Strong is entitled to have applied to the sum of \$183,629.35 heretofore ascertained in Section (3).d(2) of said prior order as the amount of funds necessary to adjust the respective capital accounts, and it appearing from the evidence that she is entitled to a reduction by a credit of \$30,052.41 being the summation of:

\$56,210.02 designated as business expenses on tax returns

	20,856.78	asserted as other business farm expense
subtotal	77,066.80	
less	- 5,850.00	checks to Joe LaFontaine re son
	- 1,400.36	Earthworks transfer 6/14/99
	- 2,682.50	transfer to Earthworks Antiques 9/6/97
	- 4,000.00	double deducted (Conlon/Bank of Frankewing)
	- 1,737.50	transfer to Earthworks
	- 65.00	transfer to Earthworks
	\$61,331.44 x 49% = \$30,052.41	

THEREFORE the amount of \$153,576.94 (\$183,629.35 – \$30,052.41) is also owed by Ms. Strong to Mr. Braden out of her share of the partnership funds of the Landscaping Concepts partnership.

The trial court considered capital credits by Ms. Strong and awarded her \$30,052.41 in credits. However, the trial court limited consideration to CCFP's cattle sales and business expenses. The trial court restricted Ms. Strong to rebuttal evidence as directed by its February 14, 2004 Order and refused to consider new direct evidence on areas outside the scope of the Order.

Ms. Strong argues that the trial court erred in failing to consider additional evidence regarding her claim's for capital credits beyond the issues of CCFP's business expenses and cattle sales. Ms. Strong asserts that it was not until the Chancellor held that the partnership agreements did not restrict the partners from making capital contributions and receiving credit for those contributions (which ruling occurred at the completion of the trial) that it was necessary for the parties to try and establish those credits. Ms. Strong submits that there is no rational basis for the trial court's refusal to consider Ms. Strong's capital credits, when the court did not limit the submission of evidence on precisely the same type of capital credits for Paul Braden. Ms. Strong argues that the trial court abused its discretion when it limited her capital credit proof only to the issues relating to CCFP's business expenses and cattle sales, and when it refused to consider her request for the same kinds of contributions and expenses that caused the trial court to award Paul Braden \$183,629.35 worth of capital credits. Paul Braden asserts that the exclusion of additional direct evidence after the trial was within the discretion of the trial court and completely appropriate.

The admissibility of evidence lies within the sound discretion of the trial judge. It follows that trial courts are accorded a wide degree of latitude, and their decisions as to admissibility will only be disturbed by us when that discretion has been abused. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn.1992). An appellate court should find an abuse of discretion when it appears that a trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining. *Ballard v. Herzke*, 924 S.W.2d

652, 661 (Tenn.1996). In the present case, we find that the trial court's refusal to allow the proof beyond that relating to CCFP's business expenses and cattle sales worked an injustice to Ms. Strong. Consequently, the trial court's exclusion of this additional evidence constitutes an abuse of discretion.

The trial was held on January 12, 2004, and a written Order was issued on February 13, 2004. However, the court continued to accept evidence on many matters including unaccounted for assets of CCFP, and other matters relating to the winding up of partnership businesses. The trial court did not render its final order until August 5, 2004. The trial court's ruling that no additional proof could be tendered on issues not addressed by the court at trial was materially unfair to Ms. Strong. We hold that Ms. Strong should be allowed to provide proof of her capital contributions in the same manner and breadth that was allowed Paul Braden. We remand this issue to the trial court for consideration of Ms. Strong's capital contributions based upon all of the evidence provided to the trial court by Ms. Strong on February 17, 2004. However, as our ruling on issue number two, *supra*, dictates, in calculating Ms. Strong's capital account contributions, the trial court must make a factual determination of whether consent was given by Paul Braden for her contributions to the capital account. If, and only if, Mr. Braden consented to such contributions by Ms. Strong, would they result in an adjustment in Strong's capital account.

4. Whether the trial court erred in failing to find a breach of contract and breach of fiduciary duty for Paul Braden's exclusion of Nancy Strong from the Landscaping Concepts partnership?

Ms. Strong argues that the trial court committed error when it failed to render a decision on her breach of contract and breach of fiduciary duty claim against Paul Braden. Rule 3(a) of the Rules of Appellate Procedure provides that final judgments are appealable as of right. *See* Tenn. R. App. P. 3(a). The rule goes on to provide that if "multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims . . . is not enforceable or appealable and is subject to revision at any time before entry of a final judgment." Tenn. R. App. P. 3(a). From the record before us, it appears that the trial court failed to render a decision on Ms. Strong's breach of contract and breach of fiduciary duty claims against Paul Braden relating to LCP. Because the trial court's order did not render a decision on the breach issues there was no final judgment.

Our Supreme Court has recognized that "[u]nless an appeal from an interlocutory order is provided by the rules or by statute, appellate courts have jurisdiction over final judgments only." *Bayberry Assoc.. v. Jones*, 783 S.W.2d 553, 559 (Tenn. 1990) (citing *Aetna Cas. & Sur. Vo. v. Miller*, 491 S.W.2d 85 (Tenn. 1973)). Rule 2 of the Tennessee Rules of Appellate Procedure, however, allows this Court to suspend, for good cause, "the requirements or provisions of any of these rules," except Rules 4, 11 and 12. *See* Tenn. R. App. P. 2. Therefore, there is "no bar to suspension of Rule 3(a)." *Bayberry Assoc.*, 783 S.W.2d at 559.

In order to suspend the requirements of Rule 3(a), this Court must affirmatively show that the rule is suspended and must give a "good reason" for the suspension. *See Bayberry Assoc.*, 783 S.W.2d at 559; *see also* Tenn. R. App. P. 2. The stated purpose behind Rule 2 is to empower the

courts “to relieve litigants of the consequences of noncompliance with the rules in those circumstances in which it is appropriate to do so.” Tenn. R. App. P. 2 (advisory committee comment). We find it appropriate to do so here. This Court, on its own motion and pursuant to Rule 2, suspends Rule 3(a) in this case. These parties have been entangled in this case for over five years and are entitled to some form of closure. Furthermore, this Court stayed the distribution of the LCP and CCFP proceeds (a balance of \$580,158.21) by Order dated December 9, 2004, and only the Braden Construction assets have been distributed to the former partners. We find these to be “good reason” to suspend the application of Rule 3(a) and address the merits of this appeal. Ms. Strong’s claim for breach of contract and breach of fiduciary duty against Paul Braden is also remanded to the trial court.

5. Whether the trial court erred in failing to award Paul Braden a capital credit equal to 49% of the personal debt of Nancy Strong that was rolled into the promissory note of Chicken Creek Farms?

Nancy Strong incurred a debt obligation to the Bank of Frankewing on behalf of Earthworks Antiques, and the balance on the debt in 1999 was \$42,148.07. Earthworks Antiques was one of the offshoot businesses of LCP that also included Braden Surveying and Braden Construction. The antiques, surveying and construction businesses shared office space and shared the cost for rent, utilities and phone expenses. In April 1999, the debt of CCFP at the Bank of Frankewing was refinanced and the debt of Earthworks Antiques was rolled into CCFP’s note and was secured by real estate of that partnership. Paul Braden consented to the assumption of the Earthworks Antiques debt by CCFP. At trial, Paul Braden sought a capital credit of 49% of the \$42,148.07 claiming that it was personal debt of Ms. Strong’s and that he had no ownership in Earthworks Antiques, nor any personal obligation to pay the Earthworks debt. The trial court denied Paul Braden’s request stating that he had acquiesced to the assumption of the debt by CCFP; therefore, it was not an appropriate capital account adjustment.

Testimony at trial clearly established that Paul Braden consented to the assumption of the Earthworks debt by CCFP. The proof is sufficient to justify a finding that Paul Braden acquiesced in the rolling over of the Earthworks Antiques note into that of CCFP’s. There is no evidence that Paul Braden believed that the assumption of the debt by CCFP would operate as a capital account credit to him when he agreed to it. The evidence does not preponderate against the trial court’s ruling. The order of the trial court denying Paul Braden a capital account credit equal to 49% of the personal debt of Nancy Strong that was rolled into the promissory note of CCFP is, therefore, affirmed.

For the reasons set forth herein, we affirm in part, reverse in part and remand for the consideration of capital account adjustments to Paul Braden and Nancy Strong, for an accounting of Braden Construction/Braden LLC, and for consideration of Nancy Strong’s claims of breach of contract and breach of fiduciary duty against Paul Braden. Costs of this appeal are assessed one-half to the Appellant, Nancy Strong and her surety, and one-half to Appellee, Paul Braden.

FRANK CRAWFORD, PRESIDING JUDGE, W.S.